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Chairman and Members
House Transportation Committee
State Capitol

Senate Bill 349 – Senator Tutvedt

The Montana Newspaper Association, which represents Montana's daily and weekly newspapers, is opposed to Senate Bill 349 as written.

The Montana Newspaper Association was a party to lawsuits resulting in Supreme Court decisions, which directly affect the proposed changes in this bill, in *Great Falls Tribune v. Day* (1998) and *Great Falls Tribune v. PSC* (2003).

The changes in this bill would specifically go in the face of these decisions, which mandated a wide range of access to the public in contracts such as are covered in this bill.

Our concerns with this level are based on two levels, statutory and constitutional.

The wording of the bill itself, and specifically, the relationship between the existing Section 184-126 and Section 18-4-304, which is not affected by this bill, causes the first. Section 18-4-304 requires all information submitted in connection with a bid to be public except for trade secrets defined in the Uniform Secrets Act, safety matters and other constitutional protections.

But the new section proposed for this bill, 18-4-126 would add "confidential or proprietary information," which exceeds the narrow definition of trade secrets contained in the Uniform Trade Secret Acts. Under the Act, trade secrets are defined as information that is valuable from not being generally known, and not readily ascertainable and not being readily ascertainable by other persons who can obtain economic value from its disclosure or use and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

And that leaves a conflict between the proposed wording in the bill and the existing Section 18-4-304.

Perhaps even more importantly, is the conflict between the bill and the Montana Constitution, which requires all government documents to be open, except where the demands of individual privacy clearly exceed public disclosure.

There are four specific areas that are of concern in this bill.

First, it doesn't recognize the Supreme Court ruling under *Great Falls v. Day* (1998) that documents filed by bidders are presumptively available for public access. In that case, the court recognized there might be an exception from disclosure for legitimate trade secrets and individual safety information, and 18-4-304 was amended to reflect that.

Second, It doesn't require the person seeking to protect some private property interest to affirmatively establish by support supporting affidavit, making a prima facie showing that materials constitute property rights, which are protected under constitutional due process requirements. It must be specific enough for the agency and the public to understand the nature and basis of the claim to confidentiality.

In *Great Falls Tribune v. PSC* in 2003 the Court ruled corporations do not enjoy the right of privacy contemplated by the open records provisions of Article II, Section 9 of the Constitution. The court recognized that the secrecy bar may be lower if the government requires certain information to be filed but if the disclosure of trade secrets is made voluntarily, with the understanding that it may be public, there is no confidential protection.

Third, if the agency soliciting the bid doesn't require the filing of a particular document, which the bidder claims to be proprietary, and the bidder files it anyway, any due process rights are waved and any statutory change should give notice to the bidder of this result.

And fourth, there still has to be a balancing of the due process rights with the right to know. A flat proscription against disclosure is not supported constitutionally.

These statutes deal generally with procurement of goods and services. It is inconceivable any bidder would have to submit trade secret information in order to have a bid considered by a public agency. Even under an alternative project delivery contract bid, the information required by Section 18-2-503 (2) is not proprietary. Even the bidder's financial health is not a trade secret.

Because these contracts involve major expenditure fund, public scrutiny of these expenditures is vital. And that dictates that any statute which seeks to keep information related to the bid confidential must be very narrowly drawn to allow transparency, a requirement which the bill as proposed does not do.

We ask the bill receive a Do Not Pass or that amendments be considered to address these concerns.

John Barrows
Executive Director